85-620

Supreme Court, U.S.
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In the Supreme Court of the United States

Petition for a Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit

CATHERINE and FRANK HELMINSKI, as Next Friends of HUGH HELMINSKI, a Minor,
Petitioners,

vs.

AYERST LABORATORIES, a Division of American Home Products Corporation, a Delaware corporation,
Respondent.

Supreme Court No. _____
Circuit Court No. 83-1726
[766 F.2nd 208 (1985)]
District Court No. 82 70042

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BRIEF OF RESPONDENT AYERST LABORATORIES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF PETITIONERS CATHERINE AND FRANK HELMINSKI

KOHL, SECREST, WARDLE, LYNCH, CLARK and HAMPTON

Dated: October 10, 1985 By: Michael L. Updike

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

IS A TRIAL COURT CORRECT IN EXCLUDING A MINOR PLAINTIFF FROM THE LIABILITY PORTION OF A BIFURCATED PRODUCTS LIABILITY TRIAL, WHEN ALL PARTIES TO THE ACTION AGREE THE MINOR PLAINTIFF IS AUTISTIC, HAS THE EMOTIONAL MATURITY OF A TWO-YEAR OLD CHILD, HAS NO CONTROL OVER HIS BODILY FUNCTIONS, IS UNABLE TO COMPREHEND COURTROOM PROCEEDINGS OR OTHERWISE ASSIST COUNSEL IN THE PRESENTATION OF HIS CASE, AND WHOSE PRESENCE WOULD BE UNDULY PREJUDICIAL TO THE DEFENDANT?

The Petitioners contend the answer to the question is "No".

The Respondent contends the answer to the question is "Yes".

The District Court, the Honorable Robert E. Demascio of the United States District Court for the Eastern District of Michigan, answered the question "Yes".

The Court of Appeals, the Honorable Anthony J. Celebrezze, the Honorable Albert J. Engel, and the Honorable Damon J. Keith of the United States Court of Appeals for the Sixth Circuit answered the question "Yes", providing the Minor Plaintiff was examined by the District Court prior to exclusion.

TABLE OF CONTENTS

	PAGE
Counterstatement of the Question Presented	i
Index of Authorities	iv-vi
Counterstatement of the Case	1-7
Summary of Argument	7-9
Argument	
A trial court is correct in excluding a minor plaintiff from the liability portion of a bifurcated products liability trial, when all parties to the action agree the minor plaintiff is autistic, has the emotional maturity of a two-year old child, has no control over his bodily functions, is unable to comprehend courtroom proceedings or otherwise assist counsel in the presentation of his case, and whose presence would be unduly prejudicial to the defendant.	
I. Certiorari should be denied because of the lack of a substantial Federal question	9-11
II. The action of the District Court, affirmed by the Sixth Circuit, was in accord with settled and well-reasoned precedents	12-15
III. The authorities cited by the Petitioners are inapplicable to the facts of the instant litigation	15-17
IV. The paramount concern of the American system of justice, correctly recognized by the Sixth Circuit, is to guarantee all parties a fair trial	17-20

PAGE

V. The Sixth Circuit did not err by allowing persons unable to understand proceedings or to assist counsel to be excluded from the liability portion of a bifurcated products liability trial 20-22

VI. The Sixth Circuit did not err in allowing the decision of the District Court to exclude the incompetent minor without an in-court examination of the minor to stand 23-24

Conclusion and Request for Relief 25

INDEX OF AUTHORITIES

CASES PAGE

Anderson v. *Sears, Roebuck & Company*, 377 F. Supp. 136 (E.D.La., 1974) 15

Andes v. *Lauer*, 80 Ill App 3rd 411; 35 Ill Dec 701; 399 NE2nd 990 (1980) 24

Appleton v. *Matthews*, 16 Ohio Misc 130; 45 Ohio Opin 2nd 90; 238 NE2nd 846 (1968) 24

Bartholomay v. *St. Thomas Lumber Company*, 148 NW2nd 278 (N.D., 1967) 15

Brown v. *United States*, 411 U.S. 223 (1973) 18, 24

Bruton v. *United States*, 391 U.S. 123 (1968) 18, 24

Bryant v. *Kansas City Railways Company*, 228 SW2nd 472 (Mo., 1921) 16

Carlisle v. *County of Nassau*, 64 AD2nd 15 (1978) .. 15

Carrington v. *Rash*, 380 U.S. 89 (1965) 21

Casson v. *Horton*, 226 Md 575; 174 A.2nd 581 (1961) 11

Chicago Great Western Railway Company v. *Beecher*, 150 F.2nd 394 (8th Cir., 1945), *certiorari denied*, 326 U.S. 781 (1946) 16

Dickson v. *Bober*, 269 Minn 334; 130 NW2nd 526 (1964) 13, 14, 15

Dublin Sportswear v. *Charlett*, 485 Pa 633; 403 A.2nd 568 (1979) 11

Fillippon v. *Albion Vein Slate Company*, 240 U.S. 76 (1919) 16

Florida Greyhound Lines v. *Jones*, 60 SW2nd 396 (Fla, 1952) 15

PAGE

Griffin v. *County School Board*, 377 U.S. 218 (1964) 21

Heck v. *Anderson*, 12 NW2nd 849 (Iowa, 1944) ... 11

Helfferich v. *Farley*, 36 Conn Sup 333; 419 A.2nd 913 (1980) 11

Helminski v. *Ayerst Laboratories*, 766 F.2nd 208 (1985) 17

Hunter v. *Szumlawski*, 124 Mich App 521 (1983) .. 11, 16

Indiana & Michigan Electric Company v. *Miller*, 19 Mich App 16 (1969), *leave to appeal denied*, 383 Mich 781 (1970) 24

In re Watson, 91 Cal App 3rd 455 (1979) 16

Irvin v. *Dowd*, 366 U.S. 717 (1961) 18, 20

Kotteakos v. *United States*, 328 U.S. 750 (1946) 24

Loving v. *Virginia*, 388 U.S. 1 (1967) 21

Lunney v. *Graham*, 91 AD2nd 592; 457 NYS2nd 282 (1982) 11

Lutwak v. *United States*, 344 U.S. 604 (1953) 18, 24

McDonough Power Equipment Company, Inc. v. *Greenwood*, ____ U.S. ____; ____L.Ed.2nd ____; 104 S.Ct. 845 (1984) 18, 20, 24

Morley v. *Superior Court of Arizona*, 131 Ariz 85; 638 P.2nd 1331 (1981), *rehearing denied* 12, 13, 15

Odom v. *Corn Products Refining Company*, 173 Ill App 348 (1912) 16

PAGE

Purvis v. *Inter-County Telephone & Telegraph Company*, 203 So.2nd 508 (Fla. App., 1967), *rehearing denied* 15

Railway Express Agency, Inc. v. *New York*, 336 U.S. 106 (1949) 21

Raper v. *Berrier*, 246 NC 193 (1957) 16

Smith v. *Phillips*, 455 U.S. 209 (1982) 18

COURT RULES:

Federal Rule of Civil Procedure 61 24

COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case is a drug products liability action, filed in the United States District Court for the Eastern District of Michigan on January 7, 1982. The plaintiffs, Petitioners here, claimed that the *in utero* exposure of Hugh Helminski to an anesthesia gas known as Fluothane caused him to develop autism. The Fluothane had been marketed in the United States by Ayerst Laboratories, Respondent here.

The case went to trial before The Honorable Robert E. Demascio and a jury on August 15, 1983. The trial was bifurcated into liability and damages portions. The liability portion of the trial concluded in a jury verdict of no cause for action on August 26, 1983.

On September 25, 1983, the Petitioners moved for a new trial, based on various errors alleged to have occurred during the course of trial. The motion was denied in an Order of the District Court dated March 28, 1984.

The Petitioners appealed as of right to the United States Court of Appeals for the Sixth Circuit. On June 25, 1985 the Sixth Circuit, Senior Circuit Judge Anthony J. Celebrezze and Circuit Judges Albert J. Engel and Damon J. Keith, affirmed the decision of the District Court not to grant the Petitioners a new trial. The decision of the Court of Appeals is reported at 766 F.2nd 208 (1985) and was written by Senior Circuit Judge Celebrezze.

On September 23, 1985 the Petitioners filed a Petition for a Writ of Certiorari with this Honorable United States Supreme Court. The instant Brief in Opposition of Respondent was filed in due course.

II. RELEVANT FACTS

Petitioners are certified registered nurse anesthetists. (R:29-30/JA:152-153)[1] Mrs. Helminski worked as a certified registered nurse anesthetist at Holy Cross Hospital in Detroit, Michigan from 1959 until the time of trial. In January, 1966, Mrs. Helminski became pregnant with her second child. During her pregnancy, Mrs. Helminski participated as the anesthetist in 148 operations. Approximately 140 of those operations involved the administration of Fluothane anesthesia gas. (R:35, 42, 50; JA:50, 158, 160)

Fluothane is the trade name for halothane, an anesthetic. It was developed in Great Britain in the 1950's. Ayerst Laboratories received permission from the Federal Food and Drug Administration to market Fluothane as a surgical anesthetic in 1958. (R:570-571, 573-574; JA:301-302, 323-324)

In September, 1966 Hugh Helminski was born. He was eventually diagnosed as being autistic. At the time of trial, Hugh Helminski required 24-hour care and could not be left alone in public. He was not toilet trained, and required constant watching to make sure he did not get into trouble. He did not speak. The Helminskis were unable to go anywhere as a family because of Hugh Helminski's inability to control his behavior. He could not be taken to a restaurant, church, public bathroom, or even a playground, if others were present. (R:67, 73-74, 79, 175, 527; JA:174-176, 301)

Mrs. Helminski's first child was born in 1957. Her third child was born in 1970. Neither child suffers from autism or

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[1] Material here is referenced to testimony introduced at trial of this case. "R" refers to pages within the trial transcript, while "JA" refers to pages within the Joint Appendix submitted by the parties to the United States Court of Appeals for the Sixth Circuit.

any similar problem. During her third pregnancy she continued to work as a certified registered nurse anesthetist and administered Fluothane anesthetic to patients. (R:33, 64-65; JA:156, 171-172)

On January 7, 1982, Mr. and Mrs. Helminski, as Next Friends of Hugh Helminski, filed suit against Ayerst Laboratories in the United States District Court for the Eastern District of Michigan. Their Complaint was in six counts, but could fairly be summarized as a drug products liability claim. (JA:1-9)

At trial, the Helminskis presented seven (7) witnesses. The first witness was Mrs. Helminski, who gave factual testimony as to her use of Fluothane and the condition of Hugh Helminski.

The second witness was Robert Laird, an alleged expert witness in the area of pharmacology. During cross-examination it was established that Mr. Laird had never been licensed to practice medicine except briefly during World War II, had been fired or laid off from the Parke-Davis pharmaceutical firm, and had been terminated as an Assistant Professor at Wayne State University because it was "doubtful he could ever become a productive basic scientist" in pharmacology. (R:148, 170, 178-179; JA:189, 211, 215, 219-220)

During the course of his testimony, Mr. Laird admitted he could not specify the extent of Mrs. Helminski's exposure to Fluothane. He also admitted there was no published scientific research in any way linking exposure to Fluothane with autism. Finally, he admitted that the most recent research indicated there was no evidence of any correlation between birth defects of any sort and general anesthesia agents, including Fluothane. (R:220-221, 249, 259-260, 288, 294; JA: 246-247, 249, 250-253)

The third witness called by the Helminskis was Dr. Mark Thoman. Dr. Thoman testified he spent 15% to 20% of his

time testifying on behalf of plaintiffs in birth defect cases. In his opinion, Ayerst should have done animal testing to determine whether exposure to Fluothane while pregnant could lead to birth defects or autism. On cross-examination, however, Dr. Thoman admitted he had previously testified in another case that animal testing was not particularly useful in determining a product's toxicity towards humans. (R:376-378, 398-399, 403, 405; JA:204, 254-258, 262, 278)

The fourth witness called by the Helminskis was Dr. Thomas Corbett. Dr. Corbett offered no opinion as to whether there was a causal link between Mrs. Helminski's exposure to Fluothane while pregnant and Hugh Helminski's autism. He did admit, however, that his own study of nurse anesthetists, performed during 1972-1976, did not indicate exposure to anesthesia produced birth defects. (R:494, 513; JA:288, 292)

The fifth witness called by the Helminskis was Dr. Foster Redding. Dr. Redding testified he had examined Hugh Helminski in 1983 and diagnosed him as autistic. He offered no opinion as to the cause of autism, noting the cause was not presently known to science. (R:519-520; JA:296-297)

The sixth witness called by the Helminskis was Francis J. Helminski, the older brother of Hugh Helminski. He testified that Hugh Helminski was not toilet trained and required constant attendance.

Prior to calling their seventh and final witness, the Helminskis, through counsel, informed the Court that they would be presenting Hugh Helminski as a "witness", although he was obviously unable to give any testimony. After considerable discussion, the District Court bifurcated the trial into liability and damages portions, with Hugh Helminski to be excluded

from the liability portion only. The District Court, Judge Demascio, stated:

> "I see no purpose at all to it [the presentation of Hugh Helminski to the jury] other than to inflame the jury. And that is not the purpose of a court room. It is not the purpose of a trial. We are really here to determine whether or not there is truth to the claim that there is a causal connection between the exposure of a pregnant woman and autistic birth."

(R:533-535; JA:305-307)

The final witness called by the Helminskis was Mr. Frank Helminski, father of Hugh Helminski and one of the Petitioners here. He "imagined" that his wife had been exposed to comparatively high levels of Fluothane while administering anesthesia at Holy Cross Hospital. (R:536, 542, 544; JA:308, 314, 316)

The District Court denied an Ayerst motion for a directed verdict and ordered Ayerst to present its case in chief. Ayerst called three witnesses. The first witness was Dr. John B. Jewell, former Medical Director for Ayerst. He testified that extensive animal testimony of Fluothane had been conducted during 1951-1954, while Ayerst had conducted extensive clinical studies both before and after FDA approval of the drug. There had never been any report anywhere linking exposure to Fluothane with autism. (R:567-580, 587, 610; JA:321-329, 332, 330)

The second witness called by Ayerst was Dr. David Benjamin, a neurologist. He had examined Hugh Helminski, and concluded he was autistic. However, no one knew how autism worked or why it occurred. (R:628; JA:333)

The third and final witness called by Ayerst was Dr. Edward R. Ritvo, a doctor specializing in autism. He testified there was some evidence autism may be genetically linked.

However, there was no relationship between Hugh Helminski's autism and his mother's exposure to Fluothane while pregnant. Dr. Ritvo stated:

> "There isn't the slightest shred of evidence that the anesthetic gas exposure [to Fluothane] in any way caused the [autism] syndrome to develop in [Hugh Helminski]. There just isn't the slightest evidence that there is a connection between the two."

Dr. Ritvo further opined there was no way to correlate exposure to Fluothane with autism, as there was a total absence of any causative factor. (R:671-672, 677-679; JA:336-337, 338-340)

Following usual motions, closing arguments and instructions, the jury returned a verdict of no cause for action. The Helminskis sought a new trial, raising six points of error. The District Court rejected each point, and denied the Helminskis' motion. On appeal to the United States Court of Appeals for the Sixth Circuit, the Helminskis reduced their claim of error to three points: the claim by Ayerst that the Helminski case was the first of its kind during trial; the bifurcation of the trial; and the exclusion of Hugh Helminski from trial following bifurcation. The Sixth Circuit rejected all three, but focused most of its attention on the exclusion of Hugh Helminski. The Sixth Circuit concluded there was no *absolute* right of a party to be present at a civil trial, but that any involuntary exclusion must comport with due process. Due process required a determination by the trial court that (a) the person sought to be excluded was unable to comprehend courtroom proceedings or otherwise assist his or her counsel, and (b) the presence of the person would be prejudicial and contrary to the interests of justice.

In their Petition to this Supreme Court, the Helminskis have reduced their claim of error to one: the exclusion of Hugh Helminski during the liability portion of the trial.[2]

SUMMARY OF ARGUMENT

The instant Petition for a Writ of Certiorari should be denied by this Supreme Court because no substantial Federal question is presented by the Petitioners. It is well established that no absolute right to be physically present at all phases of a civil jury trial exists. The circumstances of this case, specifically the bifurcation of the trial into liability and damage portions and the inability of the incompetent minor to assist counsel or otherwise participate in the proceedings, fully justify the decision of the District Court to exclude the incompetent minor from the liability portion of the trial. The Sixth Circuit was similarly justified in affirming the decision of the District Court.

Courts that have considered situations analogous to the one at bar have concluded the interests of justice are served by (a) bifurcating trials into liability and damage portions, and (b) excluding anyone unable to assist counsel or otherwise participate in courtroom proceedings from the liability portion, where the presence of the individual would likely prejudice the jury. This course of action promotes a fair trial by keeping the jury impartial. A person's disability or its extent is irrelevant on the issue of liability.

The authorities cited by the Petitioners have no application to the case at bar. All of the authorities deal with cases where

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[2] It is recognized the Petitioners present three questions for review. However, all three revolve around the exclusion of Hugh Helminski.

there was no bifurcation of a trial into liability and damage portions, or are otherwise inapplicable to the facts of the instant litigation.

The paramount concern of the American system of justice is to provide all litigants a fair trial. A fair trial essentially means that a litigant has a right to have his or her case heard by an impartial panel. In the case at bar, the incompetent minor's condition (autism, emotional maturity of a two year old child, lack of toilet training, inability to communicate, uncontrollable outbursts) was completely irrelevant on the issue of liability. The only reason the Petitioners sought to present the incompetent minor was to prejudice the jury against the Respondent, the Petitioners' liability case having largely collapsed. Balancing the Respondent's absolute right to have a fair trial and the incompetent minor's conditional right to be present in court, the only logical course was to bar the incompetent minor from the liability portion of the case. This was recognized by the District Court and the Sixth Circuit, and does not merit further review by this Supreme Court.

Due process and equal protection do not require that all persons be treated alike. Only if classifications are arbitrary or invidious does a violation of due process and equal protection occur. In the case at bar, mentally incapacitated individuals may legitimately be treated somewhat differently than physically handicapped individuals because of the underlying purpose of allowing litigants to attend trial. That purpose is to allow litigants to assist counsel in the presentation of their case. The mentally incapacitated cannot assist counsel. It is therefore not a violation of due process and equal protection when an autistic minor, requiring 24-hour a day care and unable to communicate with others, is excluded from the liability portion of a bifurcated products liability case.

The Sixth Circuit held that a mentally incapacitated minor, such as the incompetent minor in the case at bar, may be excluded from the liability portion of a bifurcated trial, but only after an examination by the trial court. The District Court did not perform this examination in the instant litigation. However, the Sixth Circuit correctly recognized no reversible error occurred, inasmuch as the condition of the incompetent minor was made clear to the jury and the incompetent minor could not assist counsel or otherwise participate in the proceedings. Litigants are only entitled to a fair trial, not a perfect one. The error of the District Court did not deprive the Petitioners of a fair trial, and so forms no basis for reversal.

ARGUMENT

A TRIAL COURT IS CORRECT IN EXCLUDING A MINOR PLAINTIFF FROM THE LIABILITY PORTION OF A BIFURCATED PRODUCTS LIABILITY TRIAL, WHEN ALL PARTIES TO THE ACTION AGREE THE MINOR PLAINTIFF IS AUTISTIC, HAS THE EMOTIONAL MATURITY OF A TWO-YEAR OLD CHILD, HAS NO CONTROL OVER HIS BODILY FUNCTIONS, IS UNABLE TO COMPREHEND COURTROOM PROCEEDINGS OR OTHERWISE ASSIST COUNSEL IN THE PRESENTATION OF HIS CASE, AND WHOSE PRESENCE WOULD BE UNDULY PREJUDICIAL TO THE DEFENDANT.

I. CERTIORARI SHOULD BE DENIED BECAUSE OF THE LACK OF A SUBSTANTIAL FEDERAL QUESTION.

The Petitioners maintain the instant case presents an important Federal question, specifically the right of a party to be present at a civil jury trial. The Respondent suggests that no such question is involved, and the facts of the case militate against the granting of certiorari even if the Supreme Court wished to consider the issue of exclusion of parties from jury trials.

In the case at bar, there was absolutely no disagreement as to the condition of the excluded party, Hugh Helminski. He had no control over either his bodily functions or his behaviour, and had to be watched constantly. It was utterly impossible for him to have either understood the proceedings in the District Court or have assisted his counsel in any way. The only argument raised as to why he should have been present[3] was his purported constitutional "right" to be present.

> "Your Honor, my response [to the Respondent's objection to the production of Hugh Helminski] would be that the right to trial by jury, specifically a civil trial, is a right that's embodied in amendments to the United States Constitution, and the Plaintiff in this litigation is the minor, Hugh Michael Helminski. He has every bit a right to be part of this proceeding as Mr. Alteri [co-trial counsel for Respondent] or myself to be present."

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[3] There was and is a curious inconsistency in the Petitioners' argument. The Petitioners maintain in effect there is an absolute right of parties, including Hugh Helminski, to be present during the liability portion of a bifurcated drug products liability trial. However, at trial they: (a) initially had no plans to bring Hugh Helminski to trial, and (b) indicated to the District Court they planned to show him to the jury for no more than "five minutes or so", so the jury could "visualize" him. If a party has an absolute right to be present at trial, it would seem to apply for the entire trial, and not some minute fraction of the trial. In the case at bar the trial lasted seven days.

Remarks of Thomas Bleakley, trial counsel for the Petitioners. (R:532; JA:304)

There is no provision in the United States Constitution, nor in any of the twenty-six Amendments to the Constitution, that establishes a right, absolute or otherwise, of a civil litigant to be present at all phases of a jury trial. No statute of the United States, nor any statute of any of the several states, has created such a right. No decision of this Supreme Court has ever found such a right to exist by implication in the Constitution or statutes of the United States.

The general rule is that, while a party normally has a right to be present during civil jury trials, the right is not absolute. *Casson* v. *Horton*, 226 Md 575; 174 A.2nd 581 (1961); *Heck* v. *Anderson*, 12 NW2nd 849 (Iowa, 1944). Parties can be excluded if the circumstances warrant it. *Helfferich* v. *Farley*, 36 Conn Sup 333; 419 A.2nd 913 (1980); *Lunney* v. *Graham*, 91 AD2nd 592; 457 NYS2nd 282 (1982); and *Dublin Sportswear* v. *Charlett*, 485 Pa 633; 403 A.2nd 568 (1979). A party should not, however, be excluded if his or her presence would be of importance to counsel in the cross-examination of witnesses or in the general conduct of the case. *Hunter* v. *Szumlawski*, 124 Mich App 521 (1983). In the case at bar, it was undisputed that Hugh Helminski could not possibly have any understanding of the proceedings at trial, or be of any assistance to counsel.

Respondent suggests the general rule outlined above is soundly based in both law and logic. There is no good reason to modify it. Even if this Supreme Court wished to examine the issue of a party's right to be present at a civil jury trial, the instant case would not be a suitable vehicle because of the extreme facts. Given the facts of Hugh Helminski's condition, his lack of control over bodily functions and behavior, his inability to comprehend the proceedings and so forth, it would be difficult if not impossible to fashion a rule of general application. Accordingly, the Petitioners' request for a Writ of Certiorari should be denied.

II. THE ACTION OF THE DISTRICT COURT, AFFIRMED BY THE SIXTH CIRCUIT, WAS IN ACCORD WITH SETTLED AND WELL-REASONED PRECEDENTS.

Petitioners imply that the action of the District Court was without precedent. That is simply not true. A number of courts have considered fact situations virtually indistinguishable from the one at bar and have taken the same action as the District Court. In *Morley* v. *Superior Court of Arizona*, 131 Ariz 85; 638 P.2nd 1331 (1981), *rehearing denied*, the plaintiff had been injured in an automobile accident and was in a coma. The trial court bifurcated the trial into liability and damage portions. The plaintiff was excluded from appearing in court during the liability portion of the trial. The Arizona Supreme Court explained:

> "The record before us would support a finding in the instant case that the evidence relevant to the two issues [of liability and damages] is unrelated. Moreover, because we hold *infra* that Paul Morley [the plaintiff in the coma] has a right to appear before the jury during trial of the damages issue but not the liability issue, severance prevents undue prejudice to the City of Scottsdale [the defendant] which would result if the jury saw Morley's injuries before it considered whether the City was liable for those injuries. Severance will insure that Paul Morley will be present only when his presence is relevant to this case."

Morley, at 1333.

The Arizona Supreme Court made it clear that the injured plaintiff was beng excluded *only* because the trial had been bifurcated. He could not be excluded from trial if liability was found and the issue of damages had to be tried.

> "Having considered the various precedents, we believe the best rule is applied in *Dickson* v. *Bober*, 269 Minn. at 338 n. 3, 130 NW2nd at 530 n.3 (1964). '[A] plaintiff unable by reason of his injuries to contribute to or understand the trial proceedings' may be excluded, in the court's discretion, from the trial of the *liability* issue if the plaintiff will be 'fully and adequately represented by counsel.' *Id.* at 337, 130 NW2nd at 530. A plaintiff unable to communicate with counsel will have no right denied by exclusion from the courtroom during the liability portion of the trial. If in addition the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiasd jury when the source of the bias is totally irrelevant to the liability issue."

Morley, at 1334, emphasis provided by the Arizona Supreme Court. Petitioners objected to the bifurcation of the trial of the case at bar into liability and damage portions in the District Court and the Court of Appeals, but has since abandoned the issue.

The principal case relied upon by the *Morley* Court was *Dickson* v. *Bober*, 130 NW2nd 526 (1964). In *Dickson*, the plaintiff had suffered injuries in a motorcycle accident which left him mentally incapacitated. The trial court excluded the plaintiff from the entire trial, even though it had not been bifurcated into liability and damage portions. The jury returned a verdict of no cause for action. The trial court granted the plaintiff a new trial, believing in retrospect that the exclusion of the plaintiff from trial had been error.

The Minnesota Supreme Court reversed the trial court, and remanded the case back for entry of the jury's verdict of

no cause for action. The key part of the *Dickson* opinion is presented below.

> "The accident changed Allan Dickson from a vital, intelligent, healthy youth to one unable to express or sustain himself, helpless and entirely dependent on others, and wholly unable to comprehend trial proceedings. Before deciding against his appearance in court, the trial judge observed him and noted:
>
> > '***His eyes seem to function on detection of an unusual movement. Hideous and agonizing groans and sounds emanated from plaintiff. In this trial test, arranged so the court would have some conception of what was involved, the above is a fair description of the depressing spectacle that in all likelihood could have been enacted if the plaintiff's request [to present Allan Dickson to the jury] had been granted.'
>
> Plaintiffs cite numerous decisions to support their claim that Allan had an absolute constitutional right to be in court during his trial. None is authority for the proposition that the plaintiff in a personal injury action who can neither contribute evidence on the question of fault nor comprehend the proceedings is entitled as a matter of constitutional right to be present in court when the liability issue is litigated. . . ."

Dickson, at 529–530. The Minnesota Supreme Court did observe, in a footnote, that an "effective" way of handling cases involving grievously injured plaintiffs would be to bifurcate them into liability and damage portions. The plaintiffs could appear during the latter once liability was established. They could not appear during the liability portion, as their appearance was irrelevant and would likely be prejudicial to the defendant.

The Sixth Circuit adopted the rule enunciated in *Morley* v. *Superior Court of Arizona*, *supra*, and *Dickson* v. *Bober*, *supra*. It was fully entitled to do so, there being no contrary authority ever published by the Supreme Court or an earlier panel of the Sixth Circuit or any of the Circuit Courts of Appeal. Reviewing the Sixth Circuit's decision in the case at bar would therefore not resolve a split of authority which was creating substantial confusion among bench and bar.

III. THE AUTHORITIES CITED BY THE PETITIONERS ARE INAPPLICABLE TO THE FACTS OF THE INSTANT LITIGATION.

It is admitted there are a number of cases in existence where an incompetent party has been allowed to be present in the courtroom despite his or her inability to participate meaningfully in the proceedings or otherwise assist counsel in the presentation of his or her case. However, every single one of the eleven cases cited by the Petitioners involves either a situation where there was no bifurcation of the trial into liability and damages portions, or a factual background totally removed from the one at bar.[4] The plaintiffs in the cases cited by

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[4] The cases relied upon by Petitioners were: *Florida Greyhound Lines* v. *Jones*, 60 SW2nd 396 (Fla., 1952)(action for damages only); *Purvis* v. *Inter-County Telephone & Telegraph Company*, 203 So.2nd 508 (Fla. App., 1967), *rehearing denied* (action for damages only); *Anderson* v. *Sears, Roebuck & Company*, 377 F. Supp. 136 (E.D., La., 1974)(simultaneous trial on issues of liability and damages; District Court specifically noted lack of any "wrongful conduct" on part of child, the child being "well behaved and quiet the entire time she was in the courtroom"); *Carlisle* v. *County of Nassau*, 64 AD2nd 15 (1978)(liability and damages tried simultaneously; plaintiff not mentally incapacitated in any way and able to assist counsel during jury selection); *Bartholomay* v. *St. Thomas Lumber Company*, 148 NW2nd 278 (N.D., 1967)(liability and damages tried simultaneously;

(footnotes continued on next page)

the Petitioners were either allowed or required to put on a single case in chief, addressing liability and damages simultaneously. Under these circumstances, the condition of the plaintiff becomes relevant as it goes to the measure of damages. The plaintiff's inability to either understand proceedings or to assist counsel is not important, as the plaintiff's *condition* is what is at issue.[5]

(footnotes continued from previous page)

exclusion of children too young to understand trial proceedings up to discretion of trial court); *Bryant* v. *Kansas City Railways Company*, 228 SW2nd 472 (Mo., 1921)(liability and damages tried simultaneously); *Odom* v. *Corn Products Refining Company*, 173 Ill App 348 (1912)(liability and damages tried simultaneously; appellate court indicates in *obiter dicta* exclusion of children, others might be proper under certain circumstances); *Hunter* v. *Szumlanski*, 124 Mich App 521 (1983)(jury selection process started without plaintiff, who would have been able to assist counsel in picking jurors); *Raper* v. *Berrier*, 246 NC 193 (1957)(child custody dispute; trial court held to have improperly excluded parents from *in camera* examination of minor child); *Chicago Great Western Railway Company* v. *Beecher*, 150 F.2nd 394 (8th Cir., 1945), *certiorari denied*, 326 U.S. 781 (1946)(liability and damage issues tried simultaneously); and *Fillippon* v. *Albion Vein Slate Company*, 240 U.S. 76 (1919)(supplemental jury instruction given by trial court outside presence of parties and their counsel; held error to give supplemental instruction except in presence of parties or their counsel).

[5] In the case of *In re Watson*, 91 Cal App 3rd 455 (1979), it was held a developmentally disabled person had the right to attend his or her own commitment hearing. In such circumstances, the condition of the individual is the paramount issue in the case. It would be impossible to conduct a meaningful hearing without the individual present for at least part of the proceeding.

The case at bar was bifurcated into liability and damage portions. The Petitioners no longer contest bifurcation was improper.[6] They have cited no authority which requires a trial court to allow an incompetent person unable to understand proceedings or assist counsel to be physically present at trial where that person's condition is not relevant to the matter under consideration. The Respondent suggests that this Supreme Court should not create such authority. To do so would be to drastically limit a trial court's ability to run orderly proceedings. More importantly, it would make it much more difficult for defendants to receive fair trials, as will be shown *infra*.

IV. THE PARAMOUNT CONCERN OF THE AMERICAN SYSTEM OF JUSTICE, CORRECTLY RECOGNIZED BY THE SIXTH CIRCUIT, IS TO GUARANTEE ALL PARTIES A FAIR TRIAL.

In its decision in the case at bar, the Sixth Circuit, speaking through Senior Circuit Judge Celebrezze, stated:

> "The benchmark of our judiciary rests on the ability of the courts to provide all parties with a fair trial."

Helminski v. *Ayerst Laboratories*, 766 F.2nd 208 (1985), at 217. In order to have a fair trial, a party must have his or her case heard by an unbiased finder of fact, be it a judge or jury.

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[6] The Petitioners did strenuously argue against bifurcation in both the District Court and the Court of Appeals. The Court of Appeals dismissed the Petitioners' claim of error on bifurcation by noting bifurcation was a discretionary matter. The Petitioners had failed to establish any prejudice to themselves as a result of the bifurcation. Accordingly, it could not be said the District Court abused its discretion in bifurcating the trial.

Justice Marshall stated in his dissent in *Smith* v. *Phillips*, 455 U.S. 209 (1982), at 224:

> "The right to a trial by an impartial jury lies at the very heart of due process. *Irvin* v. *Dowd*, 366 U.S. 717, 721-722, 81 S. Ct. 1639, 1641-1642, 6 L.E.2d 751 (1961)."

Although no one is entitled to a perfect trial, everyone is, without exception of any sort, entitled to a fair trial. *McDonough Power Equipment Company, Inc.* v. *Greenwood*, __ U.S. __; __ L.Ed.2nd __; 104 S. Ct. 845 (1984); *Brown* v. *United States*, 411 U.S. 223 (1973); *Bruton* v. *United States*, 391 U.S. 123 (1968); and *Lutwak* v. *United States*, 344 U.S. 604 (1953).

In the case at bar, the District Court was faced with a conflict between the Respondent's absolute right to a fair trial, and the Petitioners' claimed right to have an incompetent minor who could not understand proceedings or assist counsel present for the liability portion of the case. The District Court made the decision that the Respondent's right to a fair trial, to have the case heard by an impartial jury, outweighed the right for the incompetent minor to appear briefly during the liability portion of the trial.[7] It was the correct decision then, as was recognized by the Sixth Circuit. It should not be reversed by this Supreme Court, as the right of everyone to a fair trial — a trial by unbiased jurors — would inevitably be compromised by such action.

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[7] Everyone agreed the incompetent minor could be present during the damages portion, assuming the jury made the initial finding of liability in favor of the Petitioners. The physical and mental condition of the incompetent minor would be relevant to the issue of damages if liability was established.

This Supreme Court should also understand the context under which this issue arose. Although the incompetent minor had been listed on the pretrial witness list, the list had been prepared before the trial was bifurcated into liability and damage portions. Further, the Petitioners' trial counsel had made no move whatsoever to produce the incompetent minor, and had indicated he was going to show a videotape (commonly called a "day in the life of" presentation) to the jury.

It would be fair to say the Petitioners' case in chief on liability did not go well. Their expert witnesses on causation, Mr. Laird and Dr. Thoman, were shown during cross-examination to have either egregious memories or to have simply lied during their direct examination. See, generally, R:138-201, 398-415; JA:179-241, 257-274. Neither man was able to point to any hard evidence linking Fluothane with autism or *any* birth defect. The other two experts called by the Petitioners did not have the same credibility problem, but their testimony did not establish a causal relationship between exposure to Fluothane and autism. For example, Dr. Corbett had performed a study of birth defects suffered by the children of nurse anesthetists, but was unable to express an opinion as to the relationship between exposure to Fluothane and autism. (R:513; JA:292) Dr. Redding testified the incompetent minor was autistic — but he had no idea what caused the autism. (R:520-523; JA:297-299)

After their liability case had collapsed, the Petitioners suddenly discovered their incompetent minor had an absolute right to be present at trial. Since it was and is undisputed the incompetent minor could not give testimony or otherwise participate in the proceedings because of his inability to communicate and emotional maturity level (i.e., that of a two-year old child), the Petitioners were planning to do nothing less than introduce him as an exhibit.

The Petitioners never explained to the District Court why the presence or brief appearance of the incompetent minor was relevant to the issue of liability. They did not explain the minor's relevancy to the Sixth Circuit. They do not explain his relevance to this Supreme Court. The Respondent suggests the reason the Petitioners do not address relevancy because there is no relevancy. The Petitioners sought to produce the incompetent minor for one reason and one reason only: to salvage their liability case by appealing to the sympathies of the jury. Given the undisputed condition of the incompetent minor, there is little doubt sympathies would have been aroused. To avoid this, and to make sure the case was considered by a panel of impartial jurors, the District Court took the only rational course of action open to it: the exclusion of the incompetent minor until such time as the liability issue was decided. By so doing, the District Court obeyed the dictates of this Supreme Court, as established in such cases as *McDonough Power Equipment Company* v. *Greenwood*, *Irvin* v. *Dowd*, and the other cases cited *supra*. No good purpose would be served by using the resources of this Supreme Court to review that decision — there was no error, and the principle of a fair trial by impartial jurors is too important to be re-examined through the highly questionable circumstances surrounding the attempt to bring the incompetent minor before the jury.

V. THE SIXTH CIRCUIT DID NOT ERR BY ALLOWING PERSONS UNABLE TO UNDERSTAND PROCEEDINGS OR TO ASSIST COUNSEL TO BE EXCLUDED FROM THE LIABILITY PORTION OF A BIFURCATED PRODUCTS LIABILITY TRIAL.

The Petitioners maintain the Sixth Circuit erred by creating two classes of litigants: the physically handicapped and the

mentally handicapped. According to the Petitioners, the holding of the Sixth Circuit that mentally handicapped individuals can be excluded from certain phases of court proceedings (specifically, the liability portion of a bifurcated products case) violates the due process and equal protection provisions of the United States Constitution. In the Petitioners' view, both the physically and mentally handicapped should be treated exactly alike.

This Supreme Court has never held that *all* individuals must be treated alike. The mere showing that different persons are treated differently does not show a denial of due process and equal protection. See, generally, *Griffin* v. *County School Board*, 377 U.S. 218 (1964). Mere classification does not deprieve a group of equal protection. *Carrington* v. *Rash*, 380 U.S. 89 (1965). The key is whether any classifications represent invidious and arbitrary discrimination. *Loving* v. *Virginia*, 388 U.S. 1 (1967). Classifications must have a relation to the purpose for which they are made; theoretical inconsistencies are of little importance. *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949).

In the case at bar, the Sixth Circuit set up a classification based on one's ability to participate in a courtroom proceeding and assist counsel. Physically handicapped individuals can almost without exception assist counsel in the presentation of a case. Their appearance may create sympathy, but to exclude physically handicapped individuals would be even more prejudicial — they could not assist counsel in the presentation of the case. The paramount concern remains insuring a fair trial. The Sixth Circuit made the determination that the negative effects of excluding the physically handicapped from trial and thus preventing them from assisting counsel were more severe than whatever prejudice might be introduced as a result of their appearance. It was and is a rational approach to a difficult problem where there is no completely satisfactory solution.

While the physically handicapped can and generally do assist counsel and participate in courtroom proceedings, the mentally handicapped, such as the incompetent minor in the case at bar, do not. This statement does not indicate prejudice on the part of the writer, but is simple recognition of a fact of life. Indeed, the handicap suffered by a mentally handicapped person is basically the inability to communicate and understand one's surroundings. The Sixth Circuit correctly recognized that the problem of jury prejudice and sympathy could be overcome by excluding the mentally handicapped from those limited classes of cases where the condition of the mentally handicapped individual is not an issue, such as the liability portion of the trial in the instant litigation. No prejudice would accrue to the mentally handicapped individual, due to the individual's inability to assist counsel or to otherwise participate in the proceedings. In other words, there was a rational basis for the classification, and the classification was directly related to a legitimate end: the minimization of the possibility of jury prejudice and the promotion of a trial by impartial jurors.

The limited nature of the Sixth Circuit's decision must be emphasized. The mentally handicapped, those unable to assist counsel and to understand and participate in proceedings, can be excluded only from those proceedings where their condition is *not* an issue. The typical example would be a products liability case, bifurcated into liability and damage portions. The mentally handicapped could, if the trial court believed it appropriate, be excluded from the former but not the latter. In a nonbifurcated trial, or where liability was admitted, the mentally handicapped could not be excluded, although their time in the courtroom could be limited if necessary for courtroom decorum and the like. Overall, the rule enunciated in the Sixth Circuit will have very limited application, assuming it was universally followed.

VI. THE SIXTH CIRCUIT DID NOT ERR IN ALLOWING THE DECISION OF THE DISTRICT COURT TO EXCLUDE THE INCOMPETENT MINOR WITHOUT AN IN-COURT EXAMINATION OF THE MINOR TO STAND.

The Sixth Circuit held that, while a District Court could exclude a mentally handicapped individual unable to assist counsel or to otherwise participate in proceedings from trial, it could do so only *after* an examination of the handicapped individual. The District Court in the case at bar did not hold an examination of the incompetent minor, but excluded him on the basis of representations and testimony made by his counsel, mother, brother and various expert witnesses. For the record, the testimony established that the incompetent minor was 16 years old, was approximately six feet tall, weighed 90 pounds, was not toilet trained, had the emotional maturity of a two-year old child, did not communicate with anyone, could not be taken in public due to his frequent loud outbursts, and basically required 24-hour a day care and supervision. It was uncontested that the incompetent minor was totally unable to assist counsel or otherwise participate in the proceedings, although he was represented in the courtroom by his counsel and his Next Friends, his mother and father.

The Sixth Circuit concluded the District Court should have held an examination on the incompetent minor before excluding him during the liability portion of the trial. However, it was not reversible error since there was absolutely no indication the presence of the incompetent minor in court during the liability portion of the trial could have assisted the Petitioners in the presentation of their case. The Sixth Circuit also noted the jury was fully advised of the parameters of the incompetent minor's condition.

It is well settled that a litigant is entitled to a fair trial, but not a perfect one. *McDonough Power Equipment, Inc.* v. *Greenwood, supra; Brown* v. *United States, supra; Bruton* v. *United States, supra; Lutwak* v. *United States;* see also *Andes* v. *Lauer*, 80 Ill App 3rd 411; 35 Ill Dec 701; 399 NE2nd 990 (1980); *Indiana & Michigan Electric Company* v. *Miller*, 19 Mich App 16 (1969), *leave to appeal denied*, 383 Mich 781 (1970); and *Appleton* v. *Matthews*, 16 Ohio Misc 130; 45 Ohio Opin 2nd 90; 238 NE2nd 846 (1968). The general rule is that errors which do not affect the essential fairness of the trial are not to be used as a basis for reversal. *McDonough Power Equipment, Inc.* v. *Greenwood, supra;* see also *Kotteakos* v. *United States*, 328 U.S. 750 (1946) and Federal Rule of Civil Procedure 61.

The Sixth Circuit determined the incompetent minor in the case at bar did not have an unlimited, absolute right to be present in the courtroom during the liability portion of the trial. Absent such a holding, the District Court's decision to exclude the incompetent minor without a direct examination cannot legitimately be considered violation of a constitutional right. Accordingly, the Sixth Circuit was correct in finding no reversible error, particularly in light of the other circumstances of the case (i.e., the representation provided the incompetent minor by his counsel and Next Friends, his inability to assist counsel or otherwise participate in the proceedings, et cetera).

CONCLUSION AND REQUEST FOR RELIEF

The Respondent Ayerst Laboratories respectfully requests this Honorable Supreme Court of the United States to enter an Order denying the Petitioners' Petition for a Writ of Certiorari in the above-entitled cause of action for the reasons presented in this Brief.

Respectfully submitted,

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